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WHEN SHOULD SEAMEN MAINTENANCE AND CURE BENEFITS TERMINATE?

Jason Minkin*

INTRODUCTION

Under general maritime law, a shipowner has a legal duty to provide both medical care and treatment to any seaman who becomes ill or injured while in the service of the ship.¹ This duty, commonly known as maintenance and cure, extends from the onset of the seaman's illness or injury until the point at which he is cured.² The shipowner's duty, however, is not open-ended.³ In the event the seaman is diagnosed with an incurable disease or disability, the shipowner's duty to provide maintenance and cure continues no longer than the point at which the seaman has reached maximum medical improvement.⁴ Plotting the point of maximum medical improvement, however, is a troublesome task both factually and as a matter of law.⁵

In 1975, the United States Supreme Court in *Vella v. Ford Motor Co.*,⁶ tried to resolve the longstanding debate over when a seaman has reached the point of maximum medical improvement. In *Vella*, the Court declared that maximum medical improvement occurs at such time as the seaman's disease or injury is declared to be permanent, and only then is the shipowner relieved from any further obligation to provide maintenance and cure.⁷

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¹ *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938).

² *Vella v. Ford Motor Co.*, 421 U.S. 1, 5 (1975).

³ *Belcher Towing Co. v. Howard*, 638 F. Supp. 242, 243 (S.D. Fla. 1986).

⁴ *Vella*, 421 U.S. at 5. Maximum medical improvement is also referred to as "maximum cure" and "maximum medical recovery." The terms are used interchangeably by courts and commentators.

⁵ *Pelotto v. L & N Towing Co.*, 604 F.2d 396, 406 (5th Cir. 1979).

⁶ *Vella*, 421 U.S. 1 (1975).

⁷ *Id.* at 5.

In July 1996, the United States District Court for the Southern District of Florida in *Costa Crociere v. Rose*,⁸ circumvented the Supreme Court's permanency rule when it denied a shipowner's request to terminate maintenance and cure for a seaman diagnosed with an incurable and permanent kidney disorder.⁹ The issue in *Costa Crociere* was whether the shipowner remained obligated to pay for the seaman's dialysis treatment, or a possible organ transplant, since the seaman had reached the point of maximum medical improvement as defined by *Vella*.¹⁰ Refusing to be restricted by the permanency confines of *Vella*, the *Costa Crociere* court declared that a shipowner's obligation to provide maintenance and cure should continue until it has been medically determined the injured or ill seaman can no longer improve his overall medical condition, and not just the specific disease or ailments from which he suffers.¹¹

The *Costa Crociere* decision marked the Florida court's first exploration of the doctrine of maintenance and cure in the context of an incurable, life threatening disorder.¹² If the case is appealed, it is uncertain how the Eleventh Circuit will rule.

The goal of this paper is to provide a general, yet hopefully insightful, discussion of maximum medical improvement in light of the court's ruling in *Costa Crociere*. The second section of this paper will address the seaman's right and the shipowner's duty to provide maintenance and cure. Section three will discuss maximum medical improvement in general, and trace significant court decisions on the permanency rule. This section will also focus on how the Second, Third,

⁸ *Costa Crociere v. Rose*, 939 F. Supp. 1538 (S.D. Fla. 1996).

⁹ *Id.* at 1558-59.

¹⁰ *Id.* at 1539. The Court in *Vella* sought guidance from both *Farrell v. United States*, 336 U.S. 511 (1949) and Article IV, Paragraph I of the Shipowner's Liability Convention, Oct. 24, 1936, 54 Stat. 1696, T.S. No. 951, when it held that maintenance and cure should continue until the point the seaman's incapacity is declared to be permanent. See *Vella v. Ford Motor Co.*, 421 U.S. 1, 5 (1975).

¹¹ *Costa Crociere*, 939 F. Supp. at 1550.

¹² *Id.* at 1549.

Fifth and Seventh Circuits have ruled on the permanency issue. In particular, the Fifth Circuit's *Pelotto* test will be examined. Finally, this article will look at the *Costa Crociere v. Rose* decision and analyze how the outcome of this case may impact the doctrine of maintenance and cure.

THE DOCTRINE OF MAINTENANCE AND CURE

The general maritime law doctrine of "maintenance and cure" is the policy of providing a seaman,¹³ who is disabled by illness or injury while in the service of his ship, both medical care and treatment as well as the means of maintaining himself during the period of his convalescence.¹⁴ This doctrine is of ancient origin,¹⁵ dating back to the Middle Ages when various sea codes provided special protection for mariners who were injured, or became ill, while in the service of their ship.¹⁶ Article VI of the

¹³ To receive maintenance and cure, the injured or ill employee must first establish seaman status. Exactly who qualifies as a seaman is a controversial issue that has divided courts over the span of two centuries. See *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 344 (1991)); See also Edward M. Bull, *Seaman Status Revisited: A Practical Guide To Status Determination*, 6 U.S.F. MAR. L.J. 547, 562-72 (1994) (providing an overview of the judicial debate amongst various circuits in determining seaman status). In the absence of a congressional determination of seaman status, the primary guide has been the jurisprudence of the United States Supreme Court. THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW*, 4-9 at 199 (2d ed. 1994). Recently, in *Chandris, Inc. v. Latsis*, 115 S.Ct. 2172 (1995), the United States Supreme Court attempted to resolve the continuing conflict among the Courts of Appeal concerning the appropriate criteria for determining seaman status. In *Chandris*, the Court established a two-pronged seaman status criteria test: (1) the employee's duties must contribute to the function of the vessel or to the accomplishment of its mission; and (2) the employee must have a connection to a vessel in navigation (or an identifiable fleet of vessels) that is substantial in terms of both its duration and nature. *Id.* at 2190. For a thorough evaluation of the factors necessary to establish seaman status, see generally, THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW*, 4-9, pp. 198-218 (2d ed. 1994).

¹⁴ *Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962).

¹⁵ *Costa Crociere*, 939 F. Supp. at 1547.

¹⁶ *Reed v. Canfield*, 20 F. Cas 426, 428 (D. Mass. 1832) (No. 11, 641) (drawing reference to ARTICLE VI OF THE LAWS OF OLERON and ARTICLE XVIII OF THE LAWS OF WISBUY).

Laws of Oleron,¹⁷ for example, provided that if a seaman became ill or injured while in the service of his ship, "the master ought to set him ashore, to provide lodging and candlelight for him ... and likewise to afford him such diet as is usual in ship."¹⁸ Article XVIII of the Laws of Wisbuy¹⁹ similarly stated, if a seaman "being ashore in the master's or the ship's service, if he should happen to be wounded, he shall be maintained and cured at the charge of the ship."²⁰ The concept of maintenance and cure was originally brought over from England after the War of Independence, and has since evolved into a common law right under American maritime jurisprudence.²¹ The current doctrine is also reinforced by Article II of the Shipowner's Liability Convention²² that "obliges shipowners to pay compensation to seamen who are injured or fall sick during their employment."²³

¹⁷ CLEIRAC, JUGMENS D'OLERON, ARTICLE VI.

¹⁸ *Costa Crociere*, 939 F. Supp. at 1547 (citing CLEIRAC, JUGMENS D'OLERON, ARTICLE VI).

¹⁹ THE LAWS OF WISBURY, ARTICLE XVIII.

²⁰ *Reed*, 20 F. Cas. at 428.

²¹ *Costa Crociere*, 939 F. Supp. at 1547. See 46 U.S.C. § 1102 (1936) for a comprehensive annotation on maintenance, cure, and wages.

²² The Shipowner's Liability Convention, *supra* note 10.

²³ SCHOENBAUM, *supra* note 13, at 293. Article II was ratified and proclaimed by President Roosevelt on October 29, 1939. It provides: [1] The shipowner shall be liable in respect of -- (a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement; (b) death resulting from such sickness or injury. [2] Provided that national laws or regulations may make exceptions in respect of: (a) injury incurred otherwise than in the service of the ship; (b) injury or sickness due to the willful act, default or misbehavior of the sick, injured or deceased person; (c) sickness or infirmity intentionally concealed when the engagement is entered into. [3] National laws or regulations may provide that the shipowner shall not be liable in respect of sickness, or death directly attributable to sickness, if at the time of the engagement the person employed refused to be medically examined. See *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 736 (1943) (citing Article II of the Shipowner's Liability Convention, *supra* note 10). Most courts do not consider the Convention to supersede the general maritime law. See *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. § 36, 41 (1943) (determining that the Convention confirmed general maritime law).

The Seaman's Right To Maintenance And Cure

A seaman's right to maintenance and cure is implicit in the contractual relationship between the seaman and his employer.²⁴ To recover under this doctrine, the seaman must prove he suffered illness or injury or that his disability was aggravated, or became manifest while he was in the service of the ship.²⁵ This doctrine does not require the seaman be physically aboard the vessel at the time of his injury or illness because courts consider the seaman to be in the service of the ship when ashore, even on liberty, provided the seaman is subject to the master's recall.²⁶

The term "maintenance," as applied here, refers to a per diem subsistence allowance designed to provide an ill or injured seaman with compensation sufficient to cover food or lodging during the time he is unfit for duty.²⁷ If the seaman requires medical attention from a land-based physician, maintenance benefits encompass the reasonable cost of

²⁴ *Calmar S.S. v. Taylor*, 303 U.S. 525, 527-28 (1983); Maintenance and cure provisions need not be expressly stated in the employment contract. So long as the employee establishes seaman status, he is legally entitled to maintenance and cure.

²⁵ SCHOENBAUM, *supra* note 13, at 296, n. 1 (citing *Miller v. Lykes Bros-Ripley S.S. Co.*, 98 F.2d 185 (5th Cir. 1938)).

²⁶ Floyd B. Chapman and Timothy P. Groh, *AIDS, The Doctrine Of Maintenance and Cure, and Maritime Employment Discrimination: Charting A Course Between Scylla and Charybdis*, 24 U. MIAMI INTER-AM. L. REV. 325, 353 (citing *Farrell v. United States*, 336 U.S. 511, 516 (1949)). See also *Koistiner v. American Export Lines, Inc.*, 83 N.Y.S.2d 297 (1948) (awarding maintenance and cure to a seaman who injured himself when he was forced to flee a brothel after a dispute arose over fees). With regard to the in the service of the ship issue, the Court in *Farrell* stated that a seaman was in the service of the ship provided he was generally answerable to the call of duty at the time of the accident. *Farrell*, 336 U.S. at 516. The determination of whether a seaman is in the service of the ship and answerable to the call of duty at the time of the accident depends on the particular facts and circumstances of each case. *Baker v. Ocean Systems, Inc.*, 454 F.2d 379, 384 (5th Cir. 1972). In *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943), for example, the Court considered a seaman to be in the service of the ship when he injured himself as he returned to the vessel on an authorized shore leave in a foreign port. The Court reasoned even if the seaman had been on his own personal business ashore, he was still subject to the call of duty as a seaman, and earning wages as such. *Aguilar*, 318 U.S. at 732.

²⁷ *Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962).

food and lodging comparable to that received aboard the vessel.²⁸

"Cure," on the other hand, represents the actual cost of medical attention, including the services of physicians and nurses, as well as the cost of hospitalization, medicines, and medical apparatus.²⁹ A seaman, under maintenance and cure, also receives the wages he would have earned had he been able to complete the contractual terms of his employment.³⁰ These wages are guaranteed from the time of illness or injury until the end of the seaman's period of employment or until he becomes fit for duty, whichever occurs first.³¹

The Shipowner's Duty To Provide Maintenance And Cure³²

The duty to provide maintenance and cure is imposed on every seaman's employer.³³ The rationale behind this obligation was discussed for the

²⁸ *Farrell*, 336 U.S. at 518; *Myles v. Quinn Menhaden Fisheries, Inc.*, 302 F.2d 146, 150 (5th Cir. 1962).

²⁹ *See Nichols v. Barwick*, 792 F.2d 1520, 1523-24 (11th Cir. 1986).

³⁰ *Smith v. Atlas Off-Shore Boat Service*, 653 F.2d 1057, 1064 (5th Cir. 1981).

³¹ *Warren v. United States*, 75 F. Supp. 836, 838 (D. MASS.. 1948). In addition to a claim for maintenance and cure, if a seaman becomes ill or injured while in the service of the ship, he may also pursue a civil claim for negligence under the Jones Act, 46 App. U.S.C. § 688 (1994), and a claim for unseaworthiness of the vessel. Under appropriate circumstances, a seaman may invoke all three remedies against the shipowner. Damages, however, are adjusted to prevent double recovery. For an overview of the Jones Act and of the general maritime claim for unseaworthiness, *see generally*, SCHOENBAUM, *supra* note 13, at 249-288.

³² For many years prior to the 1980s, seamen who became ill or injured while working on United States documented vessels received free medical care in the United States Public Health Service Hospitals which have since closed. *In re The Matter of Cooper/T, Smith Stevedoring Co.*, 942 F. Supp. 267, 269 (E.D. La. 1996). Today, many seamen receive medical benefits through insurance plans offered through union membership. *Id.* If a seaman is not a member of a union or the expenses are not paid for under the union's insurance plan, the expenses must be paid by the employer. *See Macedo v. F/V Paul & Michelle*, 868 F.2d 519 (1st Cir. 1989); *Caulfield v. A C & D Marine, Inc.*, 633 F.2d 1129 (5th Cir. 1981).

³³ *Morales v. Garajak*, 829 F.2d 1355, 1358 (5th Cir. 1987) (stating that upon notification of the seaman's claim for maintenance and cure, the shipowner need not immediately commence payments. The shipowner may investigate and require corroboration of the seaman's illness or

first time in 1832 in the case of *Harden v. Gordon*.³⁴ In *Harden*, the circuit court of Maine cautioned all courts should watch with jealousy an encroachment upon the rights of seamen because these individuals "are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and from exhausting labor."³⁵ Relying on this rationale, courts since *Harden* have liberally interpreted the maintenance and cure doctrine "for the benefit and protection of seamen who are their wards."³⁶

In *Vaughan v. Atkinson*,³⁷ for example, the United States Supreme Court referred to a shipowner's liability for maintenance and cure as "pervasive." The Court found liability should not be defeated by restrictive distinctions nor should it be narrowly confined.³⁸ Likewise, in *Aguilar v. Standard Oil Co.*,³⁹ the Supreme Court emphasized that, whenever resolving disputes over maintenance and cure, "if leeway is to be given in either direction, all the considerations which brought the liability into being, dictate it should be on the sailor's behalf."⁴⁰

Today, the duty to provide maintenance and cure is absolute and does

injury). *Id.* at 1358 (citing *McWilliams v. Texaco, Inc.*, 781 F.2d 514, 518-20 (5th Cir. 1986)). Pursuant to investigation of the seaman's claim, if the shipowner unreasonably rejects the claim, he may be liable for both maintenance and cure payments and compensatory damages, stemming from the aggravation of the seaman's condition. *Morales*, 829 F.2d at 1358 (citing *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962)).

³⁴ *Harden v. Gordon*, 11 F. Cas. 480 (C.D. Me. 1823) (No. 6,047).

³⁵ *Id.* at 483 (stating that with respect to seamen, "they are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision is not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness").

³⁶ *Costa Crociere v. Rose*, 939 F. Supp. 1538, 1547 (S.D. Fla. 1996) (citing *Vaughan*, 369 U.S. 527, 531-32 (1962)).

³⁷ *Vaughan*, 369 U.S. 527 (1962).

³⁸ *Costa Crociere*, 939 F. Supp. at 1547 (citing *Vaughan*, 369 U.S. at 531-32).

³⁹ *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943).

⁴⁰ *Id.* at 735.

not depend on whether or not the shipowner was negligent.⁴¹ Rather, maintenance and cure is required without regard to fault,⁴² and contributory negligence on the part of the seaman will not prevent a full recovery⁴³ except in cases of willful misconduct. Moreover, the seaman's illness or injury need not be associated necessarily with his occupation.⁴⁵ The obligation to pay maintenance and cure can arise from a pre-existing medical condition such as a heart problem, a prior illness that recurs during the seaman's employment, or an injury suffered on shore, as long as the condition manifests itself while the seaman is in the service of the ship.⁴⁶ Regardless of the inherent cause or nature of the injury, the shipowner's duty to pay maintenance and cure terminates as soon as the seaman reaches the point of maximum medical improvement.⁴⁷

MAXIMUM MEDICAL IMPROVEMENT

Once the seaman has established his right to maintenance and cure, the burden of proof shifts to the shipowner to demonstrate that the seaman has reached the point of maximum medical improvement.⁴⁸ Maximum

⁴¹ *Id.* at 730.

⁴² *Seville v. United States*, 163 F.2d 296, 298-99 (9th Cir. 1947).

⁴³ *SCHOENBAUM*, *supra* note 13, at 291, n. 18 (citing *John A. Roebling's Sons Co. v. Erickson*, 261 F. 986 (2d Cir. 1919)).

⁴⁴ *Farrell v. United States*, 336 U.S. 511, 515-16 (1949). *See also* *Silmon v. Can Do II, Inc.*, 89 F.3d 240 (5th Cir. 1996) (holding that a seaman's injury resulting from illegal intravenous drug use constituted willful misconduct precluding award of maintenance and cure).

⁴⁵ *Farrell*, 336 U.S. at 516.

⁴⁶ *SCHOENBAUM*, *supra* note 13, at 293, n. 29 (citing *Breese v. AWI, Inc.*, 823 F.2d 100 (5th Cir. 1987)). Maintenance and cure benefits may be denied if, at the time of hiring, the seaman intentionally conceals the injury or ailment that manifests itself while in the service of the ship. *McCorpen v. Central Gulf Steamship Co.*, 396 F.2d 547, 548 (5th Cir. 1968), *cert. denied*, 393 U.S. 894 (1968).

⁴⁷ *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 730 (1943).

⁴⁸ *Costa Crociere v. Rose*, 939 F. Supp. 1538, 1548 (S.D. Fla. 1996).

medical improvement is a medical determination, not a legal one⁴⁹; and, as a matter of procedure, the rule requires the shipowner to seek a declaration stating the seaman has reached the point of maximum medical cure from the seaman's treating physician.⁵⁰ The shipowner must then file an action under the Declaratory Judgment Act⁵¹ to determine whether he can terminate the seaman's benefits.⁵²

Paving the Road From *Reed* To *Vella*

Throughout history, courts have adopted various formulations of maximum medical improvement.⁵³ In 1832, the Circuit Court for the District of Massachusetts in *Reed v. Canfield*⁵⁴ established the majority rule, which lasted more than a century. In *Reed*, a seaman suffered frostbite while rowing to shore from the defendant's ship.⁵⁵ In determining when the obligation to provide maintenance and cure should cease, the court declared in dicta⁵⁶ that the shipowner was "liable only for expenses

⁴⁹ *Breese v. AWI, Inc.*, 823 F.2d 100, 104-05 (1987). *See also*, *Tullos v. Resource Drilling Inc.*, 750 F.2d 380, 388 (5th Cir. 1985) (emphasizing the termination of a seaman's right to maintenance and cure should be based on an unequivocal medical determination).

⁵⁰ SCHOENBAUM, *supra* note 13, at 307, n. 9 (citing *Gillikin v. United States*, 764 F. Supp. 261, 268 (E.D. N.Y. 1991)).

⁵¹ 28 U.S.C. § 2201 (1994).

⁵² *Lancaster Towing, Inc. v. Davis*, 681 F. Supp. 387, 388 (N.D. Miss. 1988).

⁵³ *Costa Crociere v. Rose*, 939 F. Supp. 1538, 1548 (S.D. Fla. 1996).

⁵⁴ *Reed v. Canfield*, 20 F. Cas. 426 (C.C. Mass. 1832) (No. 11, 641). While attempting to delineate the extent of the shipowner's obligation, Justice Story wrote: "The sickness or other injury may occasion a temporary or permanent disability; but that is not a ground for indemnity from the shipowners. They are liable only for expenses necessarily incurred for the cure; and when the cure is completed, at least so far as the ordinary medical means extend, the shipowners are freed from all further liability..." *Id.* at 429.

⁵⁵ *Id.* at 426.

⁵⁶ The main issue in *Reed* was whether the shipowner was obligated to provide the seaman maintenance and cure since he did not injure himself during the actual voyage and the vessel was not abroad. *Id.* at 428. The fact the voyage had ended and the vessel was anchored in port did not preclude the seaman from claiming maintenance and cure. *Id.*

necessarily incurred for the cure; and when the cure is completed, at least so far as the ordinary medical means extend, the [shipowners are freed from all further liability]."⁵⁷ The decision in *Reed*, however, was not universally recognized.⁵⁸ Other courts held that a shipowner's duty to provide maintenance and cure extended no longer than the seaman's right to wages under his employment contract.⁵⁹

In 1938, the United States Supreme Court in *Calmar S.S. Corp. v. Taylor*⁶⁰ temporarily resolved this debate by declaring maintenance and cure should continue for a "fair time" after the voyage.⁶¹ The seaman in *Calmar* was diagnosed with Buerger's Disease, an incurable and fatal disease affecting the veins and arteries.⁶² Faced with the issue of whether the shipowner was obligated to provide a lump sum payment to finance the seaman's medical treatment for the remainder of his life, the Court determined "the award of a lump sum in anticipation of the continuing need of maintenance and cure for life or an indefinite period is without support in judicial decision."⁶³ The Court reasoned that lump sum payments were difficult to calculate; and, in the case of Buerger's disease, such determinations could not be measured by reference to mortality tables.⁶⁴ The Court also cautioned that an improvident seaman might be induced to spend his award on things unrelated to medical care⁶⁵; and the

⁵⁷ *Id.* at 429.

⁵⁸ William H. Welte, *Maintenance and Cure: The Third Count of The Seaman's Complaint*, 7 SUFFOLK TRANSNAT'L L.J., 1, 40, n. 71 (1983).

⁵⁹ See, e.g., *The Atlantic*, 2 F. Cas. 121, 132 (S.D. N.Y. 1849) (No. 620) (holding that an injured seaman had no claim against shipowner once the obligation to pay the seaman's wages terminated); *Nevitt v. Clarke*, 18 F. Cas. 29, 32 (S.D. N.Y. 1846) (No. 10, 138) (holding that a seaman's right to maintenance and cure is concurrent with his right to wages).

⁶⁰ 303 U.S. 525 (1938).

⁶¹ *Id.* at 531.

⁶² *Id.* at 526.

⁶³ *Id.* at 530.

⁶⁴ *Id.* at 531.

⁶⁵ Welte, *supra* note 58, at 42 (1983) (citing *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 531 (1938)).

Court concluded, "we can find no basis for saying that, if the disease proves to be incurable, the duty extends beyond a fair time after the voyage in which to effect an improvement in the seaman's condition as reasonably may be expected to result from nursing, care, and medical treatment."⁶⁶

While the Supreme Court in *Calmar* attempted to clarify the ambiguities "concerning the duration of a shipowner's obligation to provide maintenance and cure, the Court's use of such words as fair and reasonable still failed to provide a definitive solution to the problem."⁶⁷ In 1949, however, the Supreme Court clarified the duration issue in *Farrell v. United States*⁶⁸ where a seaman suffered both total and permanent blindness and post-traumatic epileptic convulsions after falling into a dry-dock.⁶⁹ Confronted with the inevitable consequence of the seaman requiring medication to ease headaches and epileptic convulsions for the remainder of his life, the Court upheld the lower court's determination that "the duty of a shipowner to furnish maintenance and cure does not extend beyond the time when the maximum cure possible has been effected."⁷⁰ On reaching its decision, the Court relied on Article IV of the Shipowner's Liability convention,⁷¹ limiting a shipowner's

⁶⁶ *Calmar*, 303 U.S. at 530.

⁶⁷ Welte, *supra* note 58, at 43 (citing G. ROBINSON, HANDBOOK OF ADMIRALTY LAW, 39, at 299 (1939)).

⁶⁸ *Farrell v. United States*, 336 U.S. 511 (1949).

⁶⁹ *Id.* at 512-13.

⁷⁰ *Id.*

⁷¹ The Shipowner's Liability Convention, *supra* note 10. The Shipowner's Liability Convention was ratified by the United States and proclaimed by the President as effective for the United States on Oct. 29, 1939. *Farrell*, 336 U.S. at 517. Article IV Section 1 of the Convention provides: "The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent nature." *Id.* (citing Article IV, Paragraph I of the Shipowner's Liability Convention, *supra* note 10).

liability to the time at which the ill or injured seaman has been cured, or until his disease or injury is declared permanent.⁷²

Article IV of the Shipowner's Liability Convention was not the only factor considered by the Court in *Farrell*. In addition, the Court also reasoned that maintenance and cure was intended to provide only limited benefits to the seaman,⁷³ and "does not hold a ship[owner] to permanent liability for a pension; neither does it give a lump sum payment to offset disability based on some conception of life expectancy."⁷⁴

Finally, the Court emphasized that maintenance and cure was not the only recourse available to the injured seaman.⁷⁵ Under the appropriate circumstances, the Court suggested, a seaman could obtain indemnity or compensation for his injuries through the Jones Act, or on a claim for unseaworthiness.⁷⁶ Consequently, the *Farrell* Court denied the injured seaman's claim for future benefits, even though it recognized that he would require treatment for the remainder of his life.⁷⁷

Finally, in 1975 the Supreme Court in *Vella v. Ford Motor Co.*⁷⁸ reaffirmed *Farrell* and examined how best to determine the point of maximum medical improvement.⁷⁹ In *Vella*, the seaman permanently damaged his inner ear when he slipped and banged his head on an

⁷² Welte, *supra* note 58, at 44, (citing Article IV, Paragraph I of the Shipowner's Liability Convention, *supra* note 10). Pursuant to the ratification of the Convention, the Department of Labor issued a summary of the Convention which stated: "The shipowner is required to furnish medical care and maintenance, including board and lodging, until the disabled person has been cured or the disability has been declared permanent." *Farrell*, 336 U.S. at 517-18 (Citing G. ROBINSON, HANDBOOK OF ADMIRALTY LAW, ' 39, at 300 (1939)).

⁷³ *Farrell*, 336 U.S. at 519.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* See *supra* note 23 for a brief overview of the Jones Act and the general maritime claim of unseaworthiness.

⁷⁷ *Farrell*, 336 U.S. at 517.

⁷⁸ 421 U.S. 1 (1975).

⁷⁹ *Id.* at 4.

electrical box aboard the defendant's ship.⁸⁰ Immediately after the accident, a physician diagnosed the seaman's ear condition as permanent.⁸¹ Confronted with the issue of whether a shipowner could terminate benefits upon a diagnosis of permanency, even when the diagnosis may be simultaneous to the time of injury, the Court held "maintenance and cure continues until such time as the incapacity is declared to be permanent."⁸² Consequently, because the seaman's ear condition was diagnosed as permanent immediately after the accident, the shipowner was justified in terminating his benefits.⁸³

Next, the *Vella* Court considered how to determine the point of maximum medical improvement.⁸⁴ Concerned that a shipowner might withhold needed benefits based on the mistaken belief the seaman had reached maximum cure, when in fact the seaman was still susceptible to curative treatment, the Court suggested maximum medical improvement should be determined pursuant to a medical diagnosis of permanency.⁸⁵ The Court reasoned a shipowner's denial of maintenance and cure, when the seaman's injury, though permanent at the time of the accident "is not medically diagnosed as permanent until long after its occurrence, would obviously disserve and frustrate the combined object of encouraging marine commerce and assuring the well-being of seamen."⁸⁶

Currently, *Vella* stands for the proposition that a shipowner's duty to provide maintenance and cure terminates once the seaman's condition is

⁸⁰ *Id.* at 2.

⁸¹ *Id.* at 5.

⁸² *Id.* (citing The Shipowner's Liability Convention, *supra* note 10). In *Vella*, the Court also adopted language from *Vitco v. Joncich*, 130 F. Supp. 945 (S.D. Cal. 1955), *aff'd*, 234 F.2d 161 (9th Cir. 1956) (stating the shipowner's obligation to provide maintenance and cure may not be discharged until the earliest time when it is reasonably and in good faith determined by those charged with the seaman's care and treatment that maximum care has reasonably been effected).

⁸³ *Vella v. Ford Motor Co.*, 421 U.S. 1, 4 (1975).

⁸⁴ *Welte*, *supra* note 58, at 45.

⁸⁵ *Vella*, 421 U.S. at 4.

⁸⁶ *Id.*

either cured or diagnosed as permanent.⁸⁷ Lower court application of the permanency standard has proven somewhat difficult, especially since injuries and ailments are often distinct and susceptible to different forms of treatment.⁸⁸ For example, two seamen, both diagnosed with the same form of curable cancer, may experience different results under the same mode of treatment. Whereas seaman A responds favorably to chemotherapy and moves into remission, seaman B does not respond to the treatment and his condition slowly worsens. Determining when seaman B's benefits terminate, especially since his form of cancer is curable, is complicated. As a result, lower courts which are often confronted with this type of situation, have found it necessary to evaluate each case on a fact-specific basis.⁸⁹ Consequently, while the line of cases extending from *Reed* to *Vella* may have paved the road to require a diagnosis of permanency in maximum medical improvement determinations, lower court application of the permanency rule has clearly created some major potholes.

⁸⁷ *Id.* at 5.

⁸⁸ *Costa Crociere v. Rose*, 939 F. Supp. 1538, 1549 (S.D. Fla. 1996).

⁸⁹ *Id.*

LOWER COURT APPLICATION OF THE PERMANENCY RULE

While most federal courts allow the shipowner to terminate benefits pursuant to a medical diagnosis of permanency, some federal courts continue to search for a more practical standard to be applied in maintenance and cure actions, especially in the context of an incurable disease or ailment.⁹⁰

The Second Circuit Palliative Care Analysis

The Second Circuit applies *Vella's* permanency rule through a palliative,⁹¹ rather than a curative⁹² analysis.⁹³ Thus, the Second Circuit has determined that so long as the seaman's condition is susceptible to curative treatment, the shipowner is still liable for maintenance and cure.⁹⁴ In *Muruaga v. United States*,⁹⁵ for example, the United States Court of Appeals for the Second Circuit denied continued maintenance and cure to a seaman diagnosed with an incurable hypertensive cardiovascular disease.⁹⁶ Faced with the inevitable fact that the seaman

⁹⁰ *Id.*

⁹¹ The term "palliative" is used to describe pain relieving treatment administered after the seaman's condition has been diagnosed as permanent or incurable. *Id.* (relying on *McMillan v. Tug Jane A. Bouchard*, 885 F. Supp. 452, 461 (E.D. N.Y. 1995) (explaining "as long as the seaman's condition is susceptible to curative as opposed to palliative treatment, the shipowner is liable for maintenance and cure").

⁹² The term "curative" is used to describe conditions that can be cured through the use of medicine, surgery, etc. *See generally*, *Costa Crociere*, 939 F. Supp. at 1551-52.

⁹³ *See e.g.*, *Muruaga v. United States*, 171 F.2d 318 (2d Cir. 1949).

⁹⁴ *Berke v. Lehigh Marine Disposal Corp.*, 435 F.2d 1073, 1076 (2d Cir. 1970), *cert. denied*, 404 U.S. 825 (1971). Interestingly, the Supreme Court in *Vella*, left open the question whether maintenance and cure may be awarded for palliative medical care to arrest further progress of the condition or to reduce pain. *Vella v. Ford Motor Co.*, 421 U.S. 1, 5, n. 4 (1975).

⁹⁵ *Muruaga*, 171 F.2d at 320.

⁹⁶ *Id.*

would require palliative treatment for the remainder of his life, the court declared "when maintenance and cure has brought about all the improvement to be expected in an incurable disease, the shipowner's liability ends."⁹⁷ From this, the court concluded once the seaman's condition was diagnosed as permanent or incurable, if "the seaman thereafter needs attention to maintain his improvement at the maximum level, to assist him in recovery from relapses, or to restrain the progress of the disease, the shipowner was not bound to provide it."⁹⁸

The Second Circuit reached a similar conclusion in *Desmond v. United States*⁹⁹ where a seaman was diagnosed with cerebral arteriosclerosis, an incurable spinal disease.¹⁰⁰ In determining when maintenance and cure should cease, the court held the shipowner was liable for maintenance and cure only until the disease was cured, or recognized as incurable.¹⁰¹ In the event the disease was incurable, the court stated, "the shipowner had no further liability, whether or not the seaman required additional treatment to restrain degeneracy or relieve pain."¹⁰²

⁹⁷ *Id.* at 321.

⁹⁸ *Id.*

⁹⁹ 217 F.2d 948 (2d Cir. 1954), *cert. denied*, 349 U.S. 911 (1955).

¹⁰⁰ *Id.* at 949.

¹⁰¹ *Id.* at 950.

¹⁰² *Id.* See also *Berke v. Lehigh Marine Disposal Corp.*, 435 F.2d 1073, 1076 (1970) (since further treatment for aggravated bronchitis could only relieve symptoms but would not permanently improve the condition, the seaman had reached maximum medical cure and was not entitled to continued maintenance and cure); *Lindgren v. Shepard S.S. Co.*, 108 F.2d 806 (2d Cir. 1940) (continued maintenance and cure treatment denied to a syphilitic who required periodic examinations for the rest of his life in order to prevent painful relapses, but not to cure the disease); *McMillan v. Tug Jane A. Bouchard*, 885 F. Supp. 452, 461 (E.D. N.Y. 1995) (where the court explained as long as the seaman's condition was susceptible to curative as opposed to palliative treatment, the shipowner was still liable for maintenance and cure).

Third Circuit "Arrest Further Progress" Analysis

The Third Circuit has applied the permanency rule in a like manner. In *Cox v. Dravo Corp.*,¹⁰³ the United States Court of Appeals for the Third Circuit rejected a seaman's claim for continued maintenance and cure once his injuries were diagnosed as permanent. The seaman in *Cox* sustained personal injuries working aboard the defendant's ship.¹⁰⁴ Due to the extensive nature of his injuries, the seaman was no longer able to perform strenuous activity, he suffered headaches and dizzy spells, and relied on physical therapy and prescription medication to relieve his aches and pains.¹⁰⁵ After evaluating the seaman's condition, the court concluded the seaman had reached the point of maximum medical improvement since the effect of therapy and medication was solely to relieve pain and discomfort; and no treatment would arrest the seaman's progressively deteriorating physical condition.¹⁰⁶ The court reasoned although it might be sound social policy for the shipowner to be required to insure against the cost of palliative or preventative care and to be required to provide for permanently disabled or incurably ill seaman, the United States Supreme Court had expressly rejected such a rule.¹⁰⁷

The *Cox* court also explicitly rejected two prior Third Circuit cases, *Neff v. Dravo Corp.*¹⁰⁸ and *Ward v. Union Barge Line Corp.*¹⁰⁹ In both cases, the United States Court of Appeals for the Third Circuit held a seaman was entitled to maintenance and cure, not only up to the point when treatment for his illness or injury had achieved maximum recovery possible; but, thereafter, even if the seaman had become totally and

¹⁰³ 517 F.2d 620 (3d Cir. 1975), *cert. denied*, 404 U.S. 825 (1975).

¹⁰⁴ *Id.* at 622.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 626.

¹⁰⁷ *Id.*

¹⁰⁸ 407 F.2d 228 (3d Cir. 1975).

¹⁰⁹ 443 F.2d 565 (3d Cir. 1971).

permanently disabled, so long as medical care would arrest further progress of the disease or relieve pain.¹¹⁰ The *Cox* court explicitly rejected this approach, declaring *Neff and Ward* "inconsistent with the limitations on the maintenance and cure remedy imposed by the United States Supreme Court and [finding they] must be overruled to the extent of such inconsistency."¹¹¹

Seventh Circuit Stringent "Permanent Medical Disability" Analysis

The Seventh Circuit, like the Second and Third Circuits, has also adopted a stringent application of the permanency rule. By way of illustration, in *Cella v. United States*,¹¹² the United States Court of Appeals for the Seventh Circuit denied continued maintenance and cure benefits to a seaman diagnosed with polymyositis, an incurable muscle condition.¹¹³ The seaman in *Cella* injured himself while working aboard a Navy vessel.¹¹⁴ Rejecting his claim for continued maintenance and cure, the

¹¹⁰ *Cox v. Dravo Corp.* 517 F.2d 620, 622 (3d Cir. 1975), *cert. denied*, 404 U.S. 825 (1975) (citing *Neff v. Dravo Corp.*, 407 F.2d 228 (3rd Cir. 1975) and *Ward v. Union Barge Line Corp.*, 443 F.2d 565 (3rd Cir. 1971)).

¹¹¹ *Id.* at 620.

¹¹² 998 F.2d 418 (7th Cir. 1993).

¹¹³ *Id.* at 420.

¹¹⁴ *Id.* The seaman in *Cella* was the chief cook aboard the vessel. Although he was fit for duty at the time he boarded the vessel, he suffered four separate incidents of physical injury within thirty-days: (1) he injured his lower back during the downloading of stores from the dock onto the ship; (2) he burned his hand when he lifted a twenty-quart pot filled with simmering spaghetti sauce that ultimately spilled onto his hand because the pot's handle was coated with melted butter; (3) he struck his head twice and fell on his buttocks when the vessel, under its own power, broke the mooring lines tied to the dock; and (4) he injured his lumbar spine while lifting approximately ninety pounds of pot roast from the oven after other crew members refused to help him. *Id.* While medical testimony differed as to what actually aggravated the seaman's muscle condition, this aspect of the case was not relevant to determining the point of maximum medical cure. As long as the disorder manifested itself while the seaman was in the service of the ship, any other factors, aside from willful misconduct need not be considered. *See, e.g., Silmon v. Can Do II, Inc.*, 89 F.3d 240 (5th Cir. 1996) (seaman's injury resulting from illegal IV drug use constituted willful misconduct precluding award of maintenance and cure).

court determined that once diagnosed with a "permanent medical disability," the seaman was no longer entitled to receive benefits.¹¹⁵ The court reasoned while treatment for the seaman's condition required maintenance doses of medication, he would never be cured.¹¹⁶ On the basis of this reasoning, the court declared "all meaningful hopes for recovery had ended and the seaman had reached maximum medical recovery."¹¹⁷

Fifth Circuit Application of the Permanency Rule: The "No Betterment" Test

In 1979, only four years after the United States Supreme Court's decision in *Vella*, the United States Court of Appeals for the Fifth Circuit broadened the scope of the permanency rule in *Pelotto v. L & N Towing Co.*¹¹⁸ In *Pelotto*, the court determined maximum medical improvement may be achieved only when it appears probable that further treatment would result in "no betterment of the seaman's condition."¹¹⁹ In *Pelotto*, a seaman severely injured his knee while working aboard a tugboat.¹²⁰ Fully aware his knee injury was incurable, the Court of Appeals reversed the lower court's decision denying the seaman's claim for continued

¹¹⁵ *Cella*, 998 F.3d at 430.

¹¹⁶ *Id.*

¹¹⁷ *Id.* Cases from other circuits adopting the permanency approach include: *Hubbard v. Faros Fisheries, Inc.*, 626 F.2d 196, 201 (1st Cir. 1980) (seaman was entitled to maintenance and cure only until his heart condition was diagnosed as permanent); *Mitola v. Johns Hopkins Univ. Applied Physics Lab.*, 839 F. Supp. 351, 359 (D. Md. 1993) (seaman denied further maintenance and cure benefits despite allegations of treatment available to secure against future injury).

¹¹⁸ 604 F.2d 396 (5th Cir. 1979).

¹¹⁹ *Id.* at 400. See also *Gaspard v. Taylor Diving & Salvage Co.*, 649 F.2d 372, 374, n. 3 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982) (where the court, quoting *Pelotto*, stated, "The accepted legal standard holds that maximum cure is achieved when it appears probable that further treatment will result in no betterment of the seaman's condition").

¹²⁰ *Pelotto*, 604 F.2d at 398.

maintenance and cure.¹²¹ The court reasoned as long as further treatment would effect an improvement in the condition of his knee,¹²² the seaman was entitled to continued maintenance and cure benefits.¹²³

While the court in *Pelotto* never explicitly rejected the permanency rule, the decision to terminate benefits only when it appeared probable further treatment would result in no betterment of the seaman's condition,¹²⁴ represents a clear expansion of the permanency rule.¹²⁵ Under *Pelotto*, a seaman diagnosed with an incurable or permanent disorder is not *per se* denied access to future maintenance and cure benefits; rather, a court, under *Pelotto*, must first rule out the possibility future treatment would not result in a betterment of the seaman's condition.¹²⁶ Fifth Circuit decisions since *Pelotto* have reinforced this approach.

In *Morales v. Garijak, Inc.*,¹²⁷ the United States Court of Appeals for the Fifth Circuit applied *Pelotto* in order to extend maintenance and cure benefits to a seaman who suffered a fractured wrist working aboard the defendant's ship.¹²⁸ The seaman's injury resulted in severe pain and limited motion and function of his wrist.¹²⁹ In deciding whether the seaman's injured wrist had reached the point of maximum medical improvement, the court determined it would be impossible to fix a precise date when the seaman would reach maximum cure¹³⁰ and noted that although the seaman's wrist could not heal completely, maintenance and

¹²¹ *Id.* at 400.

¹²² It can be implied such improvement in the condition of the seaman's knee related to the functional capacity and range of motion.

¹²³ *Pelotto*, 604 F.2d at 400.

¹²⁴ *Id.*

¹²⁵ See generally, *Costa Crociere v. Rose*, 939 F. Supp. 1538, 1549-50 (S.D. Fla. 1996).

¹²⁶ *Pelotto*, 604 F.2d at 400.

¹²⁷ 829 F.2d 1355 (5th Cir. 1987).

¹²⁸ *Id.* at 1359-60.

¹²⁹ *Id.*

¹³⁰ *Id.*

cure would end when the seaman reached the point at which further treatment would probably not improve his condition.¹³¹ Based on these facts, the court concluded since "further treatment could improve the overall condition of the seaman's wrist, the defendant was still under a duty to pay daily maintenance, as well as the medical expenses the seaman would reasonably incur obtaining treatment for his broken wrist."¹³²

The court in *Williams v. American River Transportation Co.*,¹³³ reached a similar conclusion. In *Williams*, the United States District Court for the Eastern District of Louisiana applied *Pelotto* to extend maintenance and cure benefits to a seaman diagnosed with a permanent spinal disorder.¹³⁴ The seaman in *Williams* permanently injured his back while working aboard his employer's ship.¹³⁵ In determining whether future back surgery was merely palliative in nature, the court relied on expert testimony and reasoned that fusion surgery might not only relieve pain and suffering but also improve the seaman's physical condition and functional capacity.¹³⁶ As such, the court concluded the seaman had not yet reached maximum medical cure.¹³⁷

Though liberal in its application, the *Pelotto* approach is not without limitation. In *Pelotto* itself, the court emphasized that in situations where "future treatment would merely relieve pain and suffering but not otherwise improve the seaman's physical condition ... maximum cure had been achieved."¹³⁸ This was the case in *Dobbs v. Lykes Bros. Steamship*

¹³¹ *Id.*

¹³² *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1359-60 (5th Cir. 1987). *See also* *L.C. Johnson v. Marlin Drilling Co.*, 893 F.2d 77, 79 (5th Cir. 1990) (holding maximum medical cure exists when it appears probable further treatment will result in no betterment of the seaman's condition).

¹³³ No. CIV.A.96-0977, 1996 WL 537722 (E.D. La. Sept. 19, 1996).

¹³⁴ *Id.* at *4.

¹³⁵ *Id.* at *1.

¹³⁶ *Id.* at *4.

¹³⁷ *Id.*

¹³⁸ *Pelotto v. L & N Towing Co.*, 604 F.2d 396, 400 (5th Cir. 1979).

Co.,¹³⁹ where the United States Court of Appeals for the Fifth Circuit denied a continued maintenance and cure request from a seaman diagnosed with a non-fatal kidney ailment known as chronic glomerulonephritis.¹⁴⁰ The seaman in *Dobbs* received six months inpatient treatment for his ailment¹⁴¹ and then, pursuant to a declaration from the seaman's physician stating he was fit to return to work, the seaman was discharged from the hospital.¹⁴² In denying the seaman's claim for continued benefits, the court reasoned that once discharged, the seaman had "received all the improvement in his condition reasonably expected to result from nursing, care, and medical treatment."¹⁴³ Based on those facts, the court concluded the seaman had reached the point of maximum medical improvement.¹⁴⁴

¹³⁹ 243 F.2d 55 (5th Cir. 1957).

¹⁴⁰ *Id.* at 59, n. 3.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Dobbs v. Lykes Bros. S.S. Co.*, 243 F.2d 55 (5th Cir. 1957). *See also Stewart v. Waterman S.S. Corp.*, 288 F. Supp. 629 (E.D. La. 1968), *aff'd*, 409 F.2d 1045 (5th Cir. 1969), *cert. denied*, 397 U.S. 1011 (1970) (the *Pelotto* court looked to the district court's rationale in *Stewart* to resolve the maximum medical improvement issue). In *Stewart*, the United States District Court for the Eastern District of Louisiana denied continued maintenance and cure to an epileptic seaman who sought drug treatments to control his occasional seizures. The court reasoned once the seaman was diagnosed with grand mal epilepsy, an incurable neurological disorder, any further treatment would be palliative and not curative in nature. *Stewart*, 288 F. Supp. at 634. Future drug therapy, according to the court, may have reduced the frequency and severity of the seaman's seizures, but would never totally eradicate them. *Id.* at 635. From this, the court declared that it would be manifestly unjust to require the shipowner to provide future maintenance and cure to a seaman who came aboard the vessel a grand mal epileptic and left the vessel a grand mal epileptic. *Id.* To hold the shipowner to such an obligation, the court held, would be to make the shipowner an unqualified insurer and grant the seaman a pension, both of which are outside the scope of the doctrine of maintenance and cure. *Id.*

THE COSTA CROCIERE v. ROSE DECISION

Many of the cases discussed above provide insight into the rationale behind lower court application of the permanency rule. Seamen, by the very nature of their occupation, are susceptible to a wide array of disease and injury.¹⁴⁵ However, since the Supreme Court's decision in *Vella*, medical advancement has been profound. Scientists have discovered many cures and effective modes of treatment for injuries and ailments once diagnosed as incurable or even fatal. Whether this means maximum medical improvement under *Pelotto* is best suited to meet the individual needs of injured or ill seamen, especially as the doctrine of maintenance and cure enters the twenty-first century is unclear. The court in *Costa Crociere v. Rose* adopted *Pelotto*'s view when it extended maintenance and cure benefits to a seaman diagnosed with an incurable kidney disorder.¹⁴⁶ In support of its decision not to terminate the medical benefits of a terminally ill seaman, the court in *Costa Crociere* reasoned, "the common law is nothing if not flexible, and must be adapted to fit the peculiar facts and circumstances of each individual case."¹⁴⁷ Accordingly, we turn now to *Costa Crociere*.

In *Costa Crociere v. Rose*, the United States District Court for the Southern District of Florida held maximum medical improvement could only be achieved when it appeared further treatment would result in "no betterment of the seaman's condition."¹⁴⁸ The court refused to restrict itself to the permanency rule, applying instead the Fifth Circuit's *Pelotto* test to extend indefinitely maintenance and cure benefits to a seaman

¹⁴⁵ *Harden v. Gordon*, 11 F. Cas. 480, 483 (C.D. Me. 1823) (No. 6047).

¹⁴⁶ *Costa Crociere v. Rose*, 939 F. Supp. 1538, 1558-59 (S.D. Fla. 1996).

¹⁴⁷ *Id.* at 1549.

¹⁴⁸ *Id.* at 1558-59.

diagnosed with an incurable and chronic kidney disorder.¹⁴⁹ Rather than concern itself with the permanent nature of the seaman's chronic disease, the court focused on the seaman's overall physical condition.¹⁵⁰ Aware that dialysis treatment or a kidney transplant could mean the difference between life and imminent death for the seaman, the court in *Costa Crociere* concluded that either form of treatment had the potential to improve the seaman's overall medical condition.¹⁵¹

Background

In *Costa Crociere*, the seaman "Rose" was a thirty-five year old citizen of Jamaica and a resident alien of the United States.¹⁵² In May 1987, after prolonged health problems and a series of medical examinations, Rose was diagnosed with IgA nephropathy, a renal disease associated with excessive immune deposits, a component of which is immunoglobulin A.¹⁵³ IgA nephropathy is an incurable kidney disease¹⁵⁴ that may result in a total loss of renal function; however, its exact cause is unknown.¹⁵⁵ Without dialysis or a kidney transplant, a patient with total renal failure will die within weeks.¹⁵⁶

¹⁴⁹ *Id.* While the Eleventh Circuit had not addressed the issue when maintenance and cure benefits should terminate, the court in *Costa Crociere* looked to the former Fifth Circuit, whose decisions it considered binding. *Costa Crociere*, 939 F. Supp. at 1549. In *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

¹⁵⁰ *Costa Crociere v. Rose*, 939 F. Supp. 1538, 1550 (S.D. Fla. 1996).

¹⁵¹ *Id.* at 1558-59.

¹⁵² *Id.* at 1540.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Costa Crociere v. Rose*, 939 F. Supp. 1538, 1540 (S.D. Fla. 1996).

¹⁵⁶ *Id.* at 1541. Rose's medical expert, Dr. David Roth, explained a dialysis patient suffering from IgA nephropathy can expect a reasonable life expectancy. Costa's medical expert, Dr. Alan Arieff, testified a dialysis patient suffering from IgA nephropathy can live ten to twenty years. *Costa Crociere*, 939 F. Supp. at 1541.

In June 1994, while serving as a crew member aboard his employer's ship, Rose suddenly became very ill and was removed from the ship for emergency medical attention.¹⁵⁷ Rose was found to have suffered total renal failure¹⁵⁸ and was placed immediately on kidney dialysis¹⁵⁹ which continued permanently three times per week.¹⁶⁰ Without dialysis or a kidney transplant, Rose was sure to die within a matter of weeks.¹⁶¹

The specific question before the court in *Costa Crociere* was whether Rose, who suffered from an incurable kidney disorder yet had been stabilized through dialysis, had reached the point of maximum medical improvement.¹⁶² On February 24, 1995, the shipowner filed a single-count complaint seeking a judicial declaration that Rose had reached the point of maximum medical improvement and that there was no longer a duty to provide Rose with maintenance and cure.¹⁶³ The shipowner claimed its obligation to provide maintenance and cure ended when Rose's condition had been stabilized on dialysis after being transported from the ship to a hospital on shore.¹⁶⁴ According to the shipowner

¹⁵⁷ *Id.* at 1540.

¹⁵⁸ *Id.* at 1541. A subsequent examination in November, 1994, revealed Rose suffered from high blood pressure, softened bones, peripheral nerve difficulties and severe walking disabilities. These conditions were attributable to his kidney disorder. *Costa Crociere*, 939 F. Supp. at 1541.

¹⁵⁹ *Costa Crociere*, 939 F. Supp. at 1541.

¹⁶⁰ *Id.* at 1541.

¹⁶¹ *Id.*

¹⁶² *Id.* at 1539. The court limited the maintenance and cure issue to the specific question of maximum medical improvement. The court, at this time, did not address Rose's obligation to seek public funds to cover his living expenses and the cost of a transplant or continued dialysis. *Id.* at 1558-59, n. 16.

¹⁶³ *Id.* at 1540. *Costa Crociere, S.p.A. (Costa)* was the owner and operator of the vessel *M/V American Adventure* on which Rose worked. Another plaintiff to this action was Family Hotel Services, Inc. (FHS). FHS employed Rose while he served aboard the *M/V American Adventure*, from early February 1994 until June 21, 1994, when he was removed from the ship for medical care and treatment. *Id.* at 1540. Hereinafter, both plaintiffs will be collectively referred to as Costa.

¹⁶⁴ *Costa Crociere v. Rose*, 939 F. Supp. 1538, 1548 (S.D. Fla. 1996). The court in *Costa Crociere* was aware of Costa's contention that Rose knowingly failed to disclose his kidney disease at the time he was hired. Pursuant to the stipulation of the parties, the court did not address

maximum medical improvement had been reached; because further treatment would merely sustain Rose's condition, but never cure it.¹⁶⁵ In response, Rose argued that he had not yet reached the point of maximum medical improvement,¹⁶⁶ since for Rose, either dialysis or a kidney transplant "undoubtedly created a reasoned prospect of a betterment of his condition."¹⁶⁷ Stated simply, such treatment meant the difference between life and death.¹⁶⁸

The court in *Costa Crociere* found itself torn between two plausible applications of maximum medical improvement: the established permanency rule and the *Pelotto* test. Unfamiliar with any maintenance and cure cases involving an incurable kidney disease requiring treatment in order to sustain life,¹⁶⁹ the court distinguished the present case from those cases where seamen sought continued maintenance and cure for pain and suffering associated with an incurable disease or ailment. In no other case did a seaman seek treatment which, unless remedied, would result in immediate death.¹⁷⁰

In *Belcher Towing Co. v. Howard*,¹⁷¹ for example, the United States District Court for the Southern District of Florida denied continued maintenance and cure to a seaman who sustained incurable neck and back

the disclosure issue at that time. *Id.*

¹⁶⁵ *Id.* at 1556. As part of its underlying rationale, *Costa* argued: "When a seaman breaks his arm, contracts a fever in a foreign port, or develops diabetes, the shipowner can at least predict his obligations under maintenance and cure and know when that obligation will end. The arm will heal -- either fully or as much as it is going to -- and the shipowner's obligation will end. The fever will run its course and the shipowner's obligation will end. But the day will never come when Rose will be pronounced cured." *Id.*

¹⁶⁶ *Costa Crociere*, 939 F. Supp. at 1548.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* The court also noted in passing that Rose had applied for, and been denied, monthly cash benefits and Medicare benefits under the Social Security disability program. *Id.* at 1558-59, n. 16.

¹⁶⁹ *Costa Crociere*, 939 F. Supp. at 1552.

¹⁷⁰ *Id.* at 1553.

¹⁷¹ 638 F. Supp. 242 (S.D. Fla. 1986).

injuries aboard the defendant's ship.¹⁷² The seaman's injuries were essentially soft tissue in nature, and he complained of a constant lingering sensation.¹⁷³ As a result, he "embarked on a medical odyssey consisting of hospitalizations and treatment by numerous physicians and chiropractors."¹⁷⁴ On the date of trial, the seaman had been seen or treated by approximately nineteen physicians, and received therapy from approximately seven different sources.¹⁷⁵ Because there was no competent medical evidence to support further orthopedic or neurological treatment for his neck and back condition, the court concluded the seaman had reached maximum medical improvement.¹⁷⁶ The court reasoned there was no prediction that, even within the standard of "reasonable medical possibility," further treatment would effect a permanent improvement of the seaman's alleged chronic and static condition.¹⁷⁷ As such, the shipowner was no longer obligated to provide the seaman maintenance and cure benefits.¹⁷⁸

Unlike the seaman in *Belcher*, the court in *Costa Crociere* was convinced Rose had not yet received the maximum available benefits of medical treatment.¹⁷⁹ Confronted with a situation where more than alleviation of pain and suffering was at stake for the seaman, and proposed treatments offered a reasoned prospect of long-term survival, the court determined maximum medical improvement under *Pelotto* was appropriate.¹⁸⁰

Even though IgA nephropathy was deemed both incurable and fatal,

¹⁷² *Belcher Towing Co.*, 638 F. Supp. at 242.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Belcher Towing Co. v. Howard*, 638 F. Supp. 242, 244 (S.D. Fla. 1986).

¹⁷⁷ *Id.* Because medical records revealed no objective signs of injury, the shipowner claimed the lingering sensation was psychological, not physical.

¹⁷⁸ *Belcher Towing Co.*, 638 F. Supp. at 244.

¹⁷⁹ *Costa Crociere v. Rose*, 939 F. Supp. 1538, 1552 (S.D. Fla. 1996).

¹⁸⁰ *Id.*

the *Costa Crociere* court did not hesitate to extend Rose's maintenance and cure benefits.¹⁸¹ This seems contrary to *Pelotto*, where maximum medical improvement cannot be reached until there is no possibility of a betterment in the seaman's condition.¹⁸² The *Pelotto* approach according to the court, was best suited to meet the medical needs of a chronically ill seaman, especially one who suffered a total renal failure.¹⁸³ In a life and death situation, the court reasoned:

the rapid advance of contemporary medical knowledge, coupled with the development of highly expensive, but extraordinarily promising treatments like dialysis and transplantation, greatly expanded the panoply of procedures that must be exhausted before an ill or injured seaman reached the point at which no further betterment of his condition was conceivable.¹⁸⁴

The *Costa Crociere* court also noted that under *Pelotto* the word 'condition' "encompassed something more than the curability of the specific disease or injury that triggered the need for maintenance and cure."¹⁸⁵ A broad reading of the word condition, the court explained, would permit "a court to tailor the remedial doctrine of maintenance and cure to fit the unique facts and circumstances of the case before it."¹⁸⁶

Rather than focusing on the chronic and incurable nature of Rose's kidney disorder, the court focused on the combined effect treatment would have on Rose's overall physical health and bodily function.¹⁸⁷ For Rose, the court determined, "dialysis or a transplant would 'better' his overall medical condition by removing toxins and replacing other vital kidney

¹⁸¹ *Id.* at 1550-51.

¹⁸² *Pelotto v. L & N Towing Co.*, 604 F.2d 396, 400 (5th Cir. 1979).

¹⁸³ *Costa Crociere v. Rose*, 939 F. Supp. 1538, 1558-59 (S.D. Fla. 1996).

¹⁸⁴ *Id.* at 1557.

¹⁸⁵ *Id.* at 1550.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

functions that were destroyed as a result of the disease."¹⁸⁸ Dialysis and transplantation would also improve other aspects of Rose's condition, including his level of blood abnormalities, his overall body chemistry, his cardiac function, and the responsiveness of his peripheral nerve system.¹⁸⁹ These modes of treatment, the court reasoned, would do much more than improve Rose's quality of life or simply make him feel better; they would prolong his life and "make him healthier in the most marked and profound sense."¹⁹⁰

Costa Crociere's Impact on the Doctrine of Maintenance and Cure

In its most basic sense, the court's decision in *Costa Crociere* stands for the proposition that a seaman's right to maintenance and cure should not be hindered by constrictive guidelines. Under *Costa Crociere*, a shipowner's obligation to provide maintenance and cure could continue for the remainder of an ill or injured seaman's life.¹⁹¹ Given the fact that the Supreme Court has not confronted the maximum medical improvement issue in over twenty years, it would be interesting to see how the current Court would rule should the decision be appealed.

The doctrine of maintenance and cure was designed and intended to hold the shipowner responsible for providing treatment necessary to nurse the ill or injured seaman to an improved state of health.¹⁹² Over the years, shipowners have relied on the limited scope of the maintenance and cure doctrine, especially during the implementation of employment policies and procedures. The shipowner's reaction to an open-ended duty to provide maintenance and cure might result in more stringent health

¹⁸⁸ *Costa Crociere v. Rose*, 939 F. Supp. 1538, 1552 (S.D. Fla. 1996).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1556-57

¹⁹² *Costa Crociere v. Rose*, 939 F. Supp. 1538, 1552 (S.D. Fla. 1996).

screening processes for seamen prior to hiring. This could have two possible effects.

First, prior to hiring, if the shipowner is completely informed of any current and/or pre-existing diseases or injuries a seaman might have, he could strategically place the seaman in a job position best suited to meet his functional capacity, skill, and medical needs. This would have the combined effect of promoting a safe and efficient work environment that is free from unknown health risks and dangers, and would also ensure that an ill or injured seaman receives necessary medical attention at the onset of the voyage, thus reducing the likelihood of sudden, unexpected attacks or even death.

Conversely, a stringent health screening policy may lead to discrimination at the hiring stage. If the shipowner believes he may have to provide maintenance and cure for an indefinite duration, he may be reluctant to hire the injured or ill seaman. Such a hiring policy would violate the Americans with Disabilities Act of 1990,¹⁹³ which provides that "no employer shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."¹⁹⁴ The Act defines a disabled person as one who:

- (1) has a "physical or mental impairment that substantially limits one or more of the major life activities of such individual,"¹⁹⁵

¹⁹³ 42 U.S.C. § 12101 (Supp. II 1990) [hereinafter ADA]. In addition to this federal statute, nearly every state and the District of Columbia has enacted statutes that prohibit discrimination against handicapped persons. See Chapman and Groh, *supra* note 26, 346 (citing Arthur S. Leonard, *Employment Discrimination Against Persons With Aids*, 10 U. DAYTON L. REV. 681, 689-96 (1985)).

¹⁹⁴ 42 U.S.C. § 12112(a) (Supp. II 1990).

¹⁹⁵ Chapman and Groh, *supra* note 26, at 345 (citing 42 U.S.C. ' 12102(2)(A) (Supp. II 1990)).

- (2) has a "record of such impairment,"¹⁹⁶ or
- (3) is "regarded as having such impairment."¹⁹⁷

Provided the ill or injured seaman fits within one of the categorical provisions of the ADA, a shipowner's reluctance to hire the seaman may inevitably result in both increased employment regulation and civil litigation as a means of redressing personal grievances against the shipowner.

CONCLUSION

The foregoing discussion hopefully provides insight into the application of maximum medical improvement in light of the court's ruling in *Costa Crociere*. As the doctrine of maintenance and cure sails into an era of technological advancement, the traditional application of the permanency rule may ultimately give way to expectations of indefinite medical care and treatment, extending well beyond the point at which a disease or illness is diagnosed as incurable or permanent. However, to date, neither Supreme Court precedent nor statutory authority warrants the imposition of an open-ended duty to provide maintenance and cure.¹⁹⁸ Moreover, additional recovery by means of the Jones Act and the unseaworthiness doctrine support the need to preserve the inherent limitations of the maintenance and cure doctrine.

By agreeing that maintenance and cure should continue until the seaman's incapacity is declared to be permanent,¹⁹⁹ the *Vella* court effectively refined the permanency rule. Exactly how the Supreme Court may one day choose to define maximum medical improvement is yet to be determined. Nevertheless, until then, a medical diagnosis of

¹⁹⁶ *Id.* (citing 42 U.S.C. § 12102(2)(B) (Supp. II 1990)).

¹⁹⁷ *Id.* (citing 42 U.S.C. § 12102(2)(C) (Supp. II 1990)).

¹⁹⁸ See *Vella v. Ford Motor Co.*, 421 U.S. 1, 5 (1975). See also Article IV, Paragraph 1 of The Shipowner's Liability Convention, *supra* note 10.

¹⁹⁹ *Vella*, 421 U.S. at 5.

permanency will remain the rule, not the exception.